

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Eighteenth Region

CHAMPLIN SHORES ASSISTED LIVING<sup>1</sup>

Employer

and

SEIU HEALTHCARE MINNESOTA

Petitioner

Case 18-RC-087228

**DECISION AND DIRECTION OF ELECTION**

Petitioner seeks to represent a unit of all full-time and regular part-time Resident Assistants and Medication Technicians employed by the Employer at its Champlin, Minnesota facility. The Employer maintains that the unit sought by Petitioner is not appropriate and that the only appropriate unit must also include the Wait Staff and Kitchen Helpers, as well as the Wellness Coordinator and Life Enrichment Assistant employed by the Employer at the facility. Also in issue is the supervisory status of the Wellness Coordinator. Petitioner contends that the Wellness Coordinator is a supervisor within the meaning of the Act and should be excluded from the unit, while the Employer maintains that the Wellness Coordinator is not a supervisor.

Based on the record and the relevant Board cases, including its recent decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), I find that the petitioned-for unit limited to the Employer's Resident Assistants and

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<sup>1</sup> The Employer's name appears as amended at the hearing.

Medication Technicians is appropriate. I further conclude that the Wellness Coordinator is a supervisor within the meaning of the Act.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>2</sup>
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. This decision first provides an overview of the Employer's operations, including departments, and staff within the departments, as well as highlighting job descriptions and reviewing daily duties of the staff. Second, the decision examines evidence concerning common terms and conditions among the Employer's employees. This is followed by a description of the Employer's meal-time and resident activities, when the bulk of the disputed employees' interactions occur. Finally, the decision analyzes Board precedent and its applicability to the facts of this case, starting with

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<sup>2</sup> The Employer, Champlin Shores Assisted Living, is a Washington corporation with an office and place of business located in Champlin, Minnesota, where it provides personal care services to residents of its assisted living facilities. During the last calendar year, a representative period, the Employer purchased and received at its Champlin, Minnesota facility, goods valued in excess of \$5,000 directly from points located outside the State of Minnesota and sold services valued in excess of \$50,000 directly to customers located outside the State of Minnesota.

community of interest among the disputed classifications, followed by the supervisory status of the Wellness Coordinator.

#### **A. General Operations, Departmental Organization and Jobs Performed by Staff**

The Employer operates a facility for persons aged 55 and up in three categories: retirement living, assisted living, and memory care. Retirement living provides an apartment, up to two meals a day, housekeeping services, and optional activities, but no medical care. There are currently 55 residents in retirement living. Assisted living serves residents who have doctors' orders indicating that assisted living is necessary. New residents in the assisted living section undergo an assessment by a nurse and get a personalized care plan covering daily activities and cares, assistance with daily medications, health condition monitoring, three meals a day, and an emergency call pendant for 24-hour-a-day staff response. There are currently 77 residents in assisted living. Memory care currently serves 16 residents and provides services similar to assisted living (although more intensive). However, memory care is a locked unit specifically designed to serve residents with Alzheimer's disease or other dementia.

The Employer's facility is licensed by the State of Minnesota for "home care;" thus it is not a nursing home. If it were a nursing home the Employer would be required to provide 24/7 professional nursing home coverage, and would be required to employ certified nursing assistants. The Employer meets neither requirement.

The Employer employs about 100 employees, including supervisors and managers, headed by its Executive Director. The total number includes two registered nurses, who work Monday through Friday daytime hours, with one of the registered nurses on call outside those hours. Also included in this number are about two individuals in the business office department (primarily engaged in human resources

issues), as well as employees in the concierge department, the housekeeping department, and the maintenance department. There is little or no evidence in the record regarding these departments. Petitioner does not seek to represent employees in these departments, and the Employer does not contend that the employees in these departments should be included in the unit.

By far the largest department is the health services department, supervised by the Resident Care Director and Wellness Nurse, both of whom are registered nurses. The Resident Care Director is primarily responsible for the memory care area, while the Wellness Nurse concentrates on the assisted living area. The health services department employs the Wellness Coordinator as well as the petitioned-for classifications, consisting of Resident Assistants (40-45 employees) and Medication Technicians (19-20 employees).

#### *The Wellness Coordinator*

The Wellness Coordinator's primary duty is to create task sheets based on each resident's plan of care. These task sheets list instructions for Resident Assistants and Medication Technicians to follow in their daily routines of caring for residents. The Wellness Coordinator also schedules hours of work for Resident Assistants and Medication Technicians.

While the Wellness Coordinator has an office where she performs administrative work, she also substitutes on the floor for Resident Assistants and Medication Technicians who call in sick, go on vacation, or otherwise fail to show up for any scheduled shifts. The record is inconsistent with regard to how often the Wellness Coordinator substitutes for absent Resident Assistants or Medication Technicians. One witness said substitution occurred 6-15 days a month, while a former Wellness

Coordinator testified that he substituted on the floor “occasional[ly] to quite frequent . . . but there were times where I probably didn’t fill in for a month and a half.”

The job description provided to and signed by the Wellness Coordinator, delegates a number of “supervisory functions” to the position. Among them are:

- Accountable for the performance of the employees under his/her supervision
- Demonstrate independent judgment
- Effectively recommend assignment of Resident Aides with respect to place, time and overall significant duties and the responsible direction of certain aspects of the work of Resident Aides in providing day to day care to residents
- Interview and make recommendations with respect to hiring decisions
- Communicate and enforce, in the interest of the Employer, policies and procedures including those dealing with rules of employee conduct . . . .
- Participate in employee performance evaluations and effectively recommend changes to terms and conditions of employment based on such evaluations
- Responsible for tracking attendance and independently imposing disciplinary action where appropriate . . . .

Both the Employer’s Executive Director and a former Wellness Coordinator who is currently employed as a Medication Technician confirmed the accuracy of the job description. For example, the former Wellness Coordinator identified by name two employees to whom he recommended discipline (although the events leading to the discipline are not specifically described) and described his participation in job interviews and hiring decisions. He also claimed responsibility for creating the format of the Employer’s health services department schedule, and, albeit briefly, described how he assigned employees to various blocks of rooms, directed their work, and monitored their performance.

### *Resident Assistants and Medication Technicians*

Resident Assistants' primary functions are providing assistance to residents with all of their activities of daily living, such as dressing, grooming, bathing, toileting, and if necessary preparing meals in resident apartments. Resident Assistants are also responsible for transporting residents who need assistance to and from the dining rooms. Medication Technicians' primary function is to distribute and administer residents' medications. To the extent they have time after administering medications (and they have time every day), they also perform the same cares as Resident Assistants. In particular they assist at meal times in the dining room as described below.

Neither Resident Assistants nor Medication Technicians require any outside licensing or certification. They are also not required to have any specific background, training or experience prior to their employment by the Employer. However, Medication Technicians must take a course and a test administered by the Employer's Wellness Nurse or Resident Care Director, and then "shadow" an experienced Medication Technician for a minimal period of time prior to assuming their duties. Medication technicians are paid 50 cents/hour more than Resident Assistants. Resident Assistants also "shadow" other Resident Assistants as part of their departmental training.

### *Employees the Employer Would Add to the Unit*

Most of the employees that the Employer would add to the unit are employed in the dietary department, which is supervised by the Dining Service Director. The department includes Cooks (three employees), Kitchen Helpers (3-4 employees), and Wait Staff (15-19 employees). The Cooks prepare three meals a day. Kitchen Helpers work primarily in the mornings on breakfast, while the Wait Staff primarily work the

evening meal. According to the Dining Service Director, Kitchen Helpers are mainly “older” and Wait Staff are mainly a “younger group of kids.” He also testified that he is working toward combining the two job descriptions into one and calling it “Dietary Aide.”

In addition to the dietary department employees, the Employer argues that the Life Enrichment Assistant should be included in the unit. The Life Enrichment Assistant works in a department consisting of herself and the director. The Life Enrichment Assistant’s function is to implement the activities program for residents in assisted living and memory care, which activities are planned and developed by the Life Enrichment Director. The assistant also drives the community bus to off-site activities, issues a calendar of activities, develops guides for other employees to use to keep residents busy, and leads activities. Resident Assistants and Medication Technicians escort residents to and from group activities.

## **B. Common Terms and Conditions of Employment**

The Employer spent considerable time and record evidence developing the contention that the employees it seeks to add to the unit share common terms of employment and benefits with the employees Petitioner seeks to represent. However, the record is very clear that almost without exception the common terms and benefits are shared not only by employees the Employer seeks to add to the unit, but by all employees.

New employee orientation begins with a two-day program the Employer conducts once a month for employees in all departments hired within the last month. This two-day program includes a tour, instructions on telephone courtesy and fire safety, and ethics training, among other things. New employees then go to their own department and shadow an experienced employee for a couple weeks. All employees, including

supervisors, also participate in on-going training the Employer calls “silver chair,” which is on-line and self-paced. The example described on the record was in fire safety. All employees share a common handbook. The Employer provides benefits including health insurance, which are available to employees in all departments equally. The benefits vary among employees based only on how many hours a week an employee works. There is one break room shared by all employees. All employees attend a monthly staff meeting, although the bulk of the staff is excused for the part of the meeting devoted to matters involving the health services department. In addition, the health services department has its own weekly meeting attended by Resident Assistants and Medication Technicians to discuss resident care issues.

According to the record, four employees work in two classifications – one included in the unit sought by Petitioner and one included in the classifications the Employer would add to the unit. All four have signed job descriptions and are therefore qualified to work both as Wait Staff and Resident Assistants. It is clear that none of the four performs both jobs at the same time, although they might perform both jobs within the same pay period. However, they have to punch in a different job code in the time clock for each classification. The record fails to reveal how frequently these four employees work in both classifications. In fact, the only specific record evidence on this subject is by the Executive Director, who merely testified that two of the four work “primarily” as Resident Assistants. The Executive Director did not explain the meaning of “primarily” or otherwise expand on this testimony. The dietary department and the health services department issue separate work schedules.

Starting wages and annual raises appear discretionary (i.e., there is no set scale or progression for time in service). The range for Resident Assistants is \$10-12.80 per



hour; for Medication Technicians, \$11-15.72; and for Wait Staff and Kitchen Helper, \$9-10.25. The Life Enrichment Assistant earns \$11.50 and the Wellness Coordinator earns \$14 per hour.

All employees at issue wear a uniform, except for the Wellness Coordinator, who wears “business casual.” The uniform includes a prescribed color for shoes and pants and shirts available through an Employer catalog. Some are provided by the Employer and additional is available for purchase. The style and color of the shirts is not further described, other than that the dietary department employees’ shirts differ from those worn by the Resident Assistants and Medication Technicians.

**C. Interactions and Common Functions between Employees in the Health Service Department and the Employees the Employer Contends Must Be Included in the Unit**

Besides common terms and conditions of employment, the Employer focuses on interactions among and common functions performed by employees in the unit sought by Petitioner and employees the Employer contends must be added to the unit. The Employer’s evidence in this regard is summarized herein. However, before doing so, the Executive Director was very clear that the three classifications the Employer would add to the unit are not allowed in the rooms of residents. Moreover, there is no record evidence that the classifications the Employer would add to the unit *ever* perform the functions of Resident Assistants or Medication Technicians unrelated to food service matters or planned activities. Thus, the employees the Employer would add do not bathe residents, medicate residents, monitor the health of the residents, or assist residents with daily functions or personal care matters unrelated to eating or activities.

The Employer’s facility contains two dining rooms, designated the “main” dining room and the one in the memory care unit. There is one kitchen, attached to the main

dining room. The memory care dining room has a coffee maker, juice dispenser, and a refrigerator/freezer. The Resident Assistants and Medication Technicians are responsible for the equipment in the memory care dining room, including keeping a temperature log for the refrigerator/freezer, as required by the state health department.

Breakfast is usually continental, served from a buffet line in the main dining room. One Resident Assistant typically stands behind the buffet line. Kitchen Helpers (and perhaps Wait Staff) put the food on the line and pass out drinks. Wait Staff (to the extent any work in the morning) and Resident Assistants bus and clean up afterwards. In addition, a Resident Assistant takes a cart from the main dining room to the memory care area dining room in order to feed the residents in the memory care area. There is no evidence that any kitchen staff help with service there.

Lunch is also served in the main dining room, although residents have the option of not taking lunch from the Employer. There is very little record evidence on how lunch is served and how many residents eat lunch in the main dining room. The only record evidence suggests that there are no Kitchen Helpers or Wait Staff on duty for lunch. Instead all service and clean-up are done by Resident Assistants and/or Medication Technicians. What is meant by service is not clear.

At the evening meal, Kitchen Helpers plate dinners for the memory care residents and carry them on a cart to the memory care unit dining room, where Resident Assistants take over service and clean-up. In the main dining room, Wait Staff serve the food banquet style and do the bulk of the clean-up.

Night shift Resident Assistants' and Medication Technicians' duties include setting up the dining rooms for breakfast.

According to the Employer's Dining Service Director, he observes dining room activities of Resident Assistants and Medication Technicians, gives them instructions, and has made comments to the Resident Care Director (both good and bad) about their performance in the dining room. Nevertheless, the Executive Director testified that the Resident Assistants' and Medication Technicians' dining room tasks are still "supervised" by the Resident Care Director. If a resident is unable to ambulate to the dining room, a Resident Assistant or Medication Technician would be responsible for taking a boxed meal to the resident's room.

Thus, according to the Employer, Resident Assistants and Medication Technicians interact with the Kitchen Helpers and Wait Staff when working in the dining room, and perform some of the same functions as the Kitchen Helpers and Wait Staff.

The record with regard to interaction between the Resident Assistants and Medication Technicians and the Life Enrichment Assistant is very similar. While not quantified and no specific examples are provided, the record suggests that at times resident assistants and medication technicians assist residents participating in activities and in fact, sometimes even are responsible for the activities instead of the life enrichment assistant.

### **Community of Interest Issue**

In determining whether a unit is "appropriately grouped" under Section 9(b) of the Act, the Board has broad discretion, "reflecting Congress' recognition 'of the need for flexibility in shaping the bargaining unit to the particular case.'" *Specialty Healthcare*, 357 NLRB No. 83, slip opinion at 9 (2012) (quoting *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985)). The Board's focus is whether the employees share a

“community of interest.” To make its determination, the Board weighs various factors, including:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

*Specialty Healthcare*, slip opinion at 9 (quoting *United Operations Inc.*, 338 NLRB 123, 123 (2002)).

It is well-settled that there may be more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining.

*Overnight Transportation Co.*, 322 NLRB 723, 723 (1996). It is also well-settled that “the Board need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there might be multiple sets of appropriate units in any workplace.” *Specialty Healthcare*, slip opinion at 7. The Board first considers the petitioned-for unit and whether it is appropriate. If it is appropriate, the inquiry is essentially over. *Id.* at 8.

However, even if the employees in the petitioned-for unit share a community of interest, the Board will nonetheless consider whether that unit is inappropriate because the smallest appropriate unit includes additional employees. *Specialty Healthcare*, slip opinion at 10. In this regard, “the proponent of the larger unit must demonstrate that employees in the more encompassing unit ‘share an overwhelming community of interest’ such that there ‘is no legitimate basis upon which to exclude certain employees from it.’” *Id.* at 11 (quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 429 (D.C. Cir. 2008)).

I conclude that the employees in the petitioned-for unit, consisting of Resident Assistants and Medication Technicians, are a clearly identifiable group of employees and share a community of interest. I further conclude that the Employer has failed to demonstrate that the kitchen staff or the Life Enrichment Assistant share such an overwhelming community of interest with these employees that there is no legitimate basis for their exclusion.

First, Resident Assistants and Medication Technicians share an identifiable community of interest distinct from the dietary employees and the Life Enrichment Assistant. They are in a separate department within the Employer's administrative structure, and they have distinct supervisors from other employees. Moreover, they have distinct functions related to resident care, such as dressing and bathing, monitoring health conditions, and helping the residents get around. There is separate departmental training (albeit informal) at the beginning of employment; the department has its own weekly staff meeting devoted to issues related to resident care; and the Resident Assistants and Medication Technicians have distinctive uniforms and separate schedules. Finally, there is barely any overlap in the wage ranges of the dietary staff as compared to Resident Assistants and Medication Technicians.

Second, Kitchen Helpers, Wait Staff, and the Life Enrichment Assistant do not have an "overwhelming community of interest" with the health services department employees. While they have common benefits, some common orientation and training, a common handbook, a common break room, and ultimate common supervision at the Executive Director level, there are a number of other employees who also share those same terms, including the Cooks, Concierge, Housekeepers, and Maintenance

Employees. Yet the Employer does not advocate including them in the unit. Therefore, these common terms obviously do not create an “overwhelming” community of interest.

More importantly, the health services department employees have distinct functions primarily related to resident care, while the kitchen employees are primarily engaged in food service, and the Life Enrichment Assistant is primarily engaged in activities and entertainment. Particularly compelling in this regard is the Executive Director’s testimony that the three classifications the Employer seeks to add are to not go into patient rooms, as well as the absence of evidence that the three classifications engage in any of the functions of the health services department employees unrelated to eating and activities.

While the Employer places considerable emphasis on the undisputed facts that health service employees also help serve food and clean up after meals, and lead or participate in some activities, it is clear that for the most part this is incidental to their resident care tasks. Moreover, it is a minority of their work day. In addition, the record reveals little about the nature of any interaction between the two groups when they do overlap in duties. For example, there is no evidence of interaction between the dietary employees and health services department employees in the memory care unit. In addition, there is no explanation of the need for work-related interaction at breakfast (when one Resident Assistant stands behind the buffet line), at lunch when apparently only Resident Assistants staff the main dining room, or at dinner when Resident Assistants do not assist in serving food. To the extent there is interaction, the record is clear that a majority of health service department employees’ time is spent on the wards and in resident rooms, whereas kitchen employees and the life enrichment assistant are prohibited from entering a resident’s room.

I recognize that a few employees might work some days in the kitchen and some days as Resident Assistants, although the record in this regard is very general. Nevertheless, even assuming four employees do so (which is not at all clear), this is a small percentage of the total of approximately 85 employees in all the relevant classifications, and there is no evidence regarding how these employees split their time between each classification. There is no evidence of whether they are paid the same or different for each job, although it is clear the Employer requires them to punch in under a different job code for each assignment. This evidence is not sufficient to create an “overwhelming” community of interest.

The Employer relies on *Odwalla, Inc.*, 357 NLRB No. 132 (2011), but that case is clearly distinguishable. In that case, the unit sought by the union included route sales drivers who delivered the employer’s juice products to stores, as well as warehouse employees who worked only in the warehouse, mechanics who worked in the field, and other classifications, yet did not include “merchandisers” who, like the route sales drivers, worked primarily in stores maintaining and arranging the products. In finding an overwhelming community of interest between merchandisers and the rest of the unit, the Board found the route sales drivers were far more like the merchandisers than they were like any other classification the union sought to include in the unit. The Board emphasized that the unit sought by the union did not match any administrative grouping of the employer, such as a department or line of supervision, and that the merchandisers and route sales representatives shared immediate supervision. In this case, on the other hand, the proposed unit constitutes a separate administrative grouping with separate supervision, and the essential functions of the dietary

department employees are not similar to health-care-related functions of the proposed unit employees.

### **Wellness Coordinator's Supervisory Status**

A Supervisor is defined in Section 2(11) of the Act as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

This section of the Act identifies a three part test. Individuals are supervisors if (1) they hold the authority to engage in any one of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp of America*, 511 U.S. 571, 573-574 (1994)); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006). Significantly, it is not required that the individual has exercised any of the powers enumerated in the statute, rather, it is the existence of the power that determines whether the individual is a supervisor. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003). The burden of proof rests on the party asserting supervisory status, and the asserting party must establish by a preponderance of the evidence that such status exists. *Oakwood Healthcare*, 348 NLRB at 694.

Both the job description for the Wellness Coordinator and the testimony of the Employer's Executive Director clearly support a conclusion that the Wellness Coordinator is a supervisor within the meaning of Section 2(11) of the Act. Specifically,



according to both the job description and the Executive Director, the Wellness Coordinator performs or at least effectively recommends the following personnel actions using independent judgment, each of which is an indication of supervisory status: assignment with respect to place, time, and overall significant duties; responsible direction; hiring; discipline; and making other changes to terms and conditions of employment based on job evaluations.

While there is little testimony in the record describing examples of the Wellness Coordinator performing these functions, which is normally required in order to find supervisory status, the job description could hardly be a clearer delegation of authority, which is just as, if not more, important than actual exercise. *Robert Greenspan, DDS*, 318 NLRB 70, 76 (1995), *enfd.* 101 F.3d 107 (2<sup>nd</sup> Cir. 1996), *cert. denied*, 519 U.S. 817 (1996). “If an employee has been delegated real authority to exercise any one of the statutory powers requiring use of independent judgment, as opposed to being merely routine or clerical, regardless of the frequency of the exercise of such a power, that employee, whatever his job title, is to be treated as a supervisor under the Act.” *Gatliff Business Prods.*, 276 NLRB 543, 555 (1985).

Also, in this case I conclude that the job description and testimony of the Executive Director constitute admissions by the party arguing against supervisory status. Thus, while largely conclusionary in nature, nevertheless in the circumstances of this case, the evidence supports a conclusion that the Wellness Coordinator is a 2(11) supervisor.

The following employees of Champlin Shores Assisted Living constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and casual/on call resident assistants and medication technicians employed by the Employer at its Champlin, Minnesota facility;<sup>3</sup> excluding all other employees, office clerical employees, managerial employees, and guards and supervisors as defined in the Act.

## **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by SEIU Healthcare Minnesota. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

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<sup>3</sup> The parties stipulated at the hearing that regular part-time and casual/on call employees are limited by the standard established in *Davison-Paxon Co.*, 185 NLRB 2 (1970).

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before close of business **September 14, 2012**. No extension of time to file this list will be granted by the Regional Director except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with

this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>4</sup> by mail, or by facsimile transmission at (612) 348-1785. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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<sup>4</sup> To file the eligibility list electronically, access the website at [www.nlr.gov](http://www.nlr.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **September 21, 2012**. *The request may be filed electronically through the Agency's website, [www.nlrb.gov](http://www.nlrb.gov),<sup>5</sup> but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 7<sup>th</sup> day of September, 2012.

/s/ Marlin O. Osthus

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Marlin O. Osthus, Acting Regional Director  
National Labor Relations Board  
Region 18  
330 South Second Avenue, Suite 790  
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<sup>5</sup> To file the request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov), click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request rests exclusively with the sender. A failure to timely file the request will not be excused on the basis that the transmission could be not accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.